

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

WADE P. TUCKER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Franklin County
No. 13,166 J. Curtis Smith, Judge

No. M2008-00531-CCA-R3-CO - Filed March 26, 2009

Appellant, Wade Tucker, pled guilty to the attempted first degree murder of his estranged wife. As a result of the same incident, he was also convicted of especially aggravated robbery and aggravated burglary in a subsequent bench trial. On appeal to this Court, the aggravated burglary conviction was reversed and ordered dismissed. Appellant filed a petition for post-conviction relief which the post-conviction court denied. This Court affirmed the post-conviction court's decision. Appellant subsequently filed a "Motion to Correct an Illegal Sentence." The trial court denied the motion, and Appellant appeals from the denial. We conclude that, pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure, Appellant does not have an appeal as of right from the trial court's denial of his motion. Therefore, the appeal is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Appeal is Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Wade P. Tucker, Clifton, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Appellant shot his estranged wife in their home on January 23, 2000. *State v. Wade P. Tucker*, No. M2001-02298-CCA-R3-CD, 2002 WL 1574998, at *2 (Tenn. Crim. App., at Nashville, Jul. 17, 2002), *perm app. denied* (Tenn. Dec. 23, 2002). As a result of the shooting, the Franklin County Grand Jury indicted him for attempted first degree murder, especially aggravated robbery, and especially aggravated burglary. *Id.* at *1. He pled guilty to attempted first degree murder and was sentenced as a Range I standard offender to twenty-four years incarceration. *Id.* He waived his

rights to a jury trial, and following a bench trial, the trial court convicted him of both especially aggravated robbery and aggravated burglary. *Id.* The trial court sentenced Appellant to five years with a thirty percent release eligibility for the aggravated burglary and twenty-four years for the especially aggravated robbery with a one hundred percent release eligibility. All sentences were ordered to run concurrently. *Id.*

On appeal, Appellant challenged his convictions for especially aggravated robbery and aggravated burglary. *Id.* This Court affirmed his especially aggravated robbery conviction but reversed the aggravated burglary conviction and ordered that it be dismissed. *Id.* at *9. In November 2003, Appellant filed a petition for post-conviction relief. *State v. Wade P. Tucker*, No. M2004-02792-CCA-R3-PC, 2005 WL 3132387, at *4 (Tenn. Crim. App., at Nashville, Nov. 22, 2005), *perm. app. denied* (Tenn. May 30, 2006). In September 2004, the post-conviction court denied the petition. *Id.* at *5. On appeal, this Court affirmed the post-conviction court's denial. *Id.* at *10.

On January 9, 2008, Appellant filed a "Motion to Correct an Illegal Sentence" based upon his assertion that the sentence was illegally imposed pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). On February 19, 2008, the trial court filed an order denying Appellant's motion. Appellant filed a timely notice of appeal.

ANALYSIS

On appeal, Appellant argues that the trial court erred in denying his motion. The State argues that Appellant does not have the right to appeal the trial court's denial of his motion.

Rule 3 of the Tennessee Rules of Appellate Procedure sets out the situations where an Appellant has an appeal as of right. Rule 3(b) of the Tennessee Rules of Appellate Procedure states:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Appellant's "Motion to Correct Illegal Sentence" does not fall within the listed situations. Our supreme court has specifically held that Rule 3(b) does not authorize an appeal as of right from the denial of a motion to correct an illegal sentence. *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005). As our supreme court has stated:

Tennessee Rule of Appellate Procedure 3(b) does not authorize a direct appeal of a dismissal of a motion to correct an illegal sentence, the method of attack utilized by *Moody*. We clarify that the proper procedure for challenging an illegal sentence at the trial level is through a petition for writ of habeas corpus, the grant or denial of which can then be appealed under the Rules of Appellate Procedure. *See Stephenson v. Carlton*, 28 S.W.3d 910, 912 (Tenn. 2000) (holding that an illegal and void sentence was properly challenged in a petition for writ of habeas corpus).

Id.

CONCLUSION

For the foregoing reasons, this appeal is dismissed.

JERRY L. SMITH, JUDGE